IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 2587 of 2004
With
FIRST APPEAL No. 2588 of 2004
With
FIRST APPEAL No. 2589 of 2004
With
FIRST APPEAL No. 2590 of 2004
With
CIVIL APPLICATION No. 14161 of 2007
In
FIRST APPEAL No. 2587 of 2004
With
CIVIL APPLICATION No. 14162 of 2007
In
FIRST APPEAL No. 2588 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE J.R.VORA

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

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THE NEW INDIA ASSURANCE CO.LTD - Appellant(s)
Versus
VINODCHANDRA BALWANTRAI BHATT & 7 - Defendant(s)

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Appearance :
MS MEGHA JANI for Appellant(s) : 1,
MR RAXIT J DHOLAKIA for Defendant(s) : 1,
RULE SERVED for Defendant(s) : 2 - 7.
MR DAKSHESH MEHTA for Defendant(s) : 8,

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CORAM : HONOURABLE MR.JUSTICE J.R.VORA

and

HONOURABLE MR.JUSTICE M.R. SHAH

Date : 12/12/2007

ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE M.R. SHAH)

1. As common question of law and facts arise in this group of four First Appeals and as they are arising out of the common judgment and award passed by the learned M.A.C.Tribunal, and arising out of the same vehicular accident, they are being disposed of by this common judgment and order.

2. With the consent of the learned Advocates appearing on behalf of the respective parties, all these appeals and the Civil Applications are taken up for final hearing today. We have called for Record and Proceedings of the case from the learned Tribunal and we have perused the same. Learned Advocates appearing on behalf of the respective appellants have also produced on record relevant documentary evidence as are relevant for the purpose of determination of the present appeals. Hence, we proceed further with the hearing of the

present appeals.

3. First Appeal No.2587 of 2004 is arising out of M.A.C.P. No.182/1995; First Appeal No.2588 of 2004 is arising out of M.A.C.P. No.183 of 1995; First Appeal No.2589 of 2004 is arising out of M.A.C.P. No.807 of 1994 and First Appeal No. 2590 of 2004 is arising out of M.A.C.P. No.22 of 1995.

4. All the aforesaid claim petitions came to be filed by the original claimants before the learned M.A.C.Tribunal (Auxi.), Surendranagar for getting compensation for vehicular accident which took place on 12.10.1994 at about 7.30. p.m. between Rajkot and Ahmedabad Highway near village Dedogi. M.A.C.P.No.807 of 1994 came to be filed by the heirs of the deceased Rashmikant who was travelling in taxi No.GJ. 3.T-8822 and who died in the vehicular accident in question. M.A.C.P.No. 22 of 1995 came to be filed by the heirs of deceased Anwarshah – Driver of Taxi No.GJ.3.T-8822. M.A.C.P.No.182 of 1995 came to be filed by the injured claimant – Vinodchandra Balwantrai Bhatt, who was travelling in said Taxi. M.A.C.P.No.183 of 1995 came to be filed by the injured claimant – Ashishbhai Nanalal Vyas, who sustained injuries in the said vehicular accident and who was travelling

in the said taxi.

5. Facts leading to the present First Appeals in nutshell are as under:

That Taxi No.GJ 3T 8822 was proceedings from Ahmedabad to Rajkot on 12.10.1994 which was driven by one Anwarshah and when said taxi was proceedings towards Rajkot, near Dedogi at about 7.30 p.m. while over taking one Tractor No. GJ.13.978 and trolley No. GJ 13 T 3429, dashed with one truck No. GJ. 11.T- 8528 which was coming from the opposite side and the said taxi dashed on the front portion of the aforesaid truck and was pushed back and thereafter dashed with the aforesaid truck and trolley and by the said impact aforesaid tractor and trolley turned turtle. In the said accident driver of the taxi Anwarshah and one passenger Rashmikant scummed to the injuries and died and two other passengers - Vinodchandra and Ashishbhai sustained serious injuries. A criminal complaint came to be filed by the driver of the tractor at Saliya Police Station. Driver of the truck ran away after the accident. That thereafter, all the aforesaid claimants preferred respective M.A.C.petitions before the learned Tribunal for getting compensation.

6. The claim petitions were opposed by the appellants herein – Insurance Company of the Truck; New India Assurance Company Ltd. as well as Insurance Company of Tractor and Trolley and taxi. Insurance Company of the truck pleaded contributory negligence on the part of the Driver of the taxi and submitted that the driver of the taxi was rash and negligent in over taking the truck, due to which accident took place and therefore, driver of the truck should not be held negligent for accident in question. The Driver of the taxi should be held solely responsible / negligent for the accident in question and in the alternative it was pleaded that the driver of the taxi should be held 75% responsible / negligent for the accident in question and consequently driver of the truck should be held negligent to the extent of 25%. On behalf of the claimant applicant of M.A.C.P. No.807 of 1994 - Jugrutiben Rashmikant came to be examined at Exh.69; the applicant - Jeluben of M.A.C.P. No. 22 of 1995 came to be examined at Exh.49. Applicant of M.A.C.P. No.182 of 1995 i.e. Vinodchandra Balwantrai Bhatt who was injured and eye-witness to the accident came to be examined at Exh.89. Similarly, one Ashishbhai Nalalal Vyas applicant of M.A.C.P. No.183 of 1995 injured and eye witness, who was also passenger in said taxi came to be examined at Exh.91.

Neither the driver of the tractor nor the driver of the truck stepped into witness box and gave evidence. Panchnama – place of the accident was produced at Exh.56 and copy of the complaint / FIR given by the driver of the tractor came to be produced at Exh.44. Learned M.A.C.Tribunal (Auxi.) vide judgment and order dated 31.03.2004 partly allowed all the aforesaid claim petitions by holding the driver of the truck contributory negligent to the extent of 75% and holding driver of the taxi negligent to the extent of 25%. Being aggrieved and dissatisfied with the common judgment and award passed by the learned M.A.C.T. (Auxi.), Surendranagar in holding the Driver of the truck contributory negligent to the extent of 75% and driver of the taxi contributory negligent to the extent of 25%, the Insurance Company of the truck in question has preferred the present First Appeals, only on the point of contributory negligence.

7. Ms.Anushree Kapadia, learned Advocate appearing for Ms. Megha Jani, learned Advocate appearing on behalf of the Insurance Company of the truck in question has vehemently submitted that the learned tribunal has materially erred in holding driver of the truck in question contributory negligent to the extent of 75%. It is submitted by her that as it

has come on record by way of evidence that the accident took place between the car and truck when the car driver was trying to over-take tractor trailer; the accident happened due to negligence on the part of the driver of the car in over-taking the tractor in haste driving, therefore, the learned tribunal ought not to have attributed more than 25% of negligence to the driver of the truck. It is submitted that learned tribunal has not properly appreciated the deposition of Vinodchandra Exh.89 i.e. applicant of MACP No.182 of 1995 who was travelling in the taxi and who has stated that driver of the car overtook the tractor in high speed. It is submitted that the said witness has also admitted that truck was coming on its left side and accident happened while car was overtaking the tractor. Therefore, in view of the aforesaid evidence of the eye-witness, the learned tribunal ought to have held the driver of the car negligent to the extent of atleast 75%. It is further submitted that the learned tribunal has also not appreciated the contents of the FIR and Panchnama and therefore, it is requested to allow the present appeals by modifying the judgment and award passed by the learned tribunal holding the driver of the car negligent to the extent of 75%.

8. All these appeals are opposed by Mr.Rakshit

Dholakia, learned Counsel appearing on behalf of the original claimants of First Appeal Nos. 2587 of 2004 and 2588 of 2004. He has submitted that looking to the panchanam it is clear that truck driver was driving the truck in excessive speed and therefore, while driver of the car was overtaking tractor, the truck dashed with the car in such a speed that the car was thrown back by 20 feet on the southern side in opposite direction. It shows that the truck driver was driving in excessive speed and therefore, the learned tribunal has rightly held driver of the truck negligent to the extent of 75%, which is not required to be interfered with. It is also submitted that even looking to the evidence of eye-witness Vinodchandra at Exh.89; looking to the FIR at Exh-44, which was given by driver of the tractor as well as panchanama, accident took place in the middle of the road and the driver of the taxi was at moderate speed and the driver of the truck was driving in excessive speed. It is submitted that even the conduct on the part of the driver of the truck is also required to be considered as immediately after the accident, he ran away. It is also further submitted that driver of the truck, who can be said to be best witness has not been examined by the Insurance Company who could have thrown light and therefore, even adverse inference can also be drawn. Mr.Dholakia, learned

Counsel appearing on behalf of the some of the claimants has relied upon the decision of the Hon'ble Supreme Court in the case of Muncipal Corporation of Greater Bombay v/s. Laxman Iyer reported in (2003) 8 SCC 731 in support of his submission with regard to contributory negligence. He has also relied upon two decisions of the Division Bench of this Court in the case of Dr.Bhanuprasad Maganlal Bhatnagar v/s. Pravin Tapubhai Nair & Ors. reported in XXII GLR 1271 and in the case of Shardaben Nitinrai & Anr. V/s. Gujarat State Road Transport Corpor., Ahmedabad & Ors. reported in XXII GLR 1258. Relying upon above decisions, Mr.Dholakia, learned Counsel appearing on behalf of the original claimants, has requested to dismiss the present appeals.

9. Heard the learned Counsels appearing on behalf of the respective parties.

10. It is not in dispute that the accident took place between the taxi and truck while driver of the taxi was overtaking one tractor cum trolley. To consider the dispute with regard to contributory negligence, panchanama of the place of the accident is vital evidence along with the evidence of the eye – witness. In the present case panchnama is

produced on record at Exh.56 and the evidence of the eye-witness Vinodchandra Balwantrai is recorded at Exh.89 and evidence of other passengers Ashishbhai Nanubhai is also recorded at Exh.91. In the present case evidence of Vindochandra is most important as he was the eye-witness to the accident and he was travelling in taxi. FIR given by the driver of the tractor is at Exh.44 which is also required to be considered. Looking to the panchnama of place of accident, it appears that the accident has taken place at Nala No.154/1 and it is found that the truck has dashed with taxi on the middle of the road 20 feet away from Nala. It also appears from the panchanama that there are marks found on the southern portion of middle of the road throwing back taxi and thereafter, after the impact, the car was thrown back to the extent of 20 feet on southern side and dashed with tractor and that tractor turned turtled. Bumper of the truck on the driver side has been damaged and head light is broken; car has been badly damaged. Looking to the impact and throwing back taxi, it appears that truck driver was driving in higher speed. In the FIR given by the driver of the tractor, it is specifically mentioned in the complaint that driver of the truck was in excessive speed. Vinodchandra – claimant of M.A.C.P. No.182 of 1995 – eye witness to the accident and who was travelling

in the taxi has submitted on oath denying suggestions that taxi was in full speed. It is also submitted by him that for overtaking driver of the taxi has to go on right hand side and truck was coming from left hand side. It is suggested on behalf of the learned Counsel appearing on behalf of the appellants that truck was on the left hand side. However, what is suggested in the evidence of Vindochandra is that truck was coming from opposite side i.e. left hand side means on his left hand side i.e. left hand side of taxi while proceedings towards east west. Thus considering the aforesaid evidence and panchnama of scene of accident; when it is found that accident took place on the middle of the road and thereafter, car was thrown back by 20 feet on the southern side and road was east-west, it appears that when taxi driver was overtaking tractor, truck was coming in excessive speed and he must have tried to take taxi on the left hand side. But looking to the speed, no time was available with him to go to the extreme left and it dashed with the truck and looking to the impact as the truck was in excessive speed, taxi was thrown back by 20 feet on the southern side. Considering above, it appears that the truck driver was in excessive speed and it cannot be said that the learned Tribunal has committed any error in appreciating the evidence and in holding driver of the truck negligent to

the extent of 75% and holding driver of the taxi negligent to the extent of 25%.

11. At this stage, decision of the Division Bench of this Court in the case of Shardaben Nitinrai (supra) is required to be referred to in which the Division Bench of this Court has observed that as soon as impact takes place between two vehicles, the speed is first neutralised by the impact and thereafter the vehicle which is proceeding at a higher speed throws back the other vehicle in the direction in which it is proceeding depending on the speed of the said vehicle after neutralisation. If this principle had been borne in mind, looking to the fact that after the impact the car was thrown back by 20 feet on the southern side it can safely be presumed that the driver of the truck was in excessive speed.

12. The conduct of the driver of the truck is also required to be considered. The driver of the truck had ran away immediately after the accident took place. Even FIR has been lodged by the driver of the tractor. Driver of the truck who is the best witness and is best evidence to throw light, has not been examined. Thus, driver is maintaining complete silent about the incident. The driver of the truck has not

stepped into witness box and maintained silent, even adverse inference can be drawn against the said driver. It is not the case of the Insurance Company that the driver is not available for giving evidence. Under the circumstances, and relying upon the Panchnama and scene of accident; and evidence of Vinodchandra and on appreciation of evidence when the learned tribunal has come to the conclusion that the driver of the truck was negligent to the extent of 75%, it cannot be said that learned tribunal has committed any error.

13. In the case of Laxman Iyer (supra) the Hon'ble Supreme Court has explained the principle of determining the contributory negligence. The Hon'ble Supreme Court has held as under:

> '*Negligence is ommission of duty caused either by an ommission to do something which a reasonable man guided upon those considerations, who ordinarily by reason of conduct of human affairs would do or be obligated to, or by doing something which a prudent or reasonable man would not do. Negligence does not always mean absolute carelessness, but want of such a degree of care as is required in particular circumstances. Negligence is failure to observe, for the protection of the interests of another person, the degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury. The idea of negligence and duty are strictly correlative. Negligence means either subjectively a careless state of mind, or objectively careless conduct.*

> *Negligence is not an absolute term, but is a relative one; it is rather a comparative term. No absolute standard can be fixed and no mathematically exact formula can be laid down by which negligence or lack of it can be infallibly measured in a given case. What constitutes negligence varies under different conditions and in determining whether negligence exists in a particular case, or whether a mere act or course of conduct amounts to negligence, all the attending and surrounding facts and circumstances have to be taken into account.*
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> *To determine whether an act would be or would not be negligent, it is relevant to determine if any reasonable man would foresee that the act would cause damage or not. The omission to do what he law obligates or even the failure to do anything in a manner, mode or method envisaged by law would equally and per se constitute negligence on the part of such person. If the answer is in the affirmative, it is a negligent act.*

14. Considering above decision of the Hon'ble Supreme Court and the facts of the case on hand, the learned Tribunal has rightly held the driver of the truck contributory negligent to the extent of 75% and in the facts and circumstances of the case and evidence on record, said finding is not required to be interfered with. No other submissions have been made by the learned Counsel appearing on behalf of the respective appellants except the question of contributory negligence.

15. For the reasons stated above, the judgment and award passed by the learned tribunal in holding driver of the truck negligent to the extent of 75% is not required to be

interfered with. Under the circumstances, all the appeals fail and are accordingly dismissed. In the facts and circumstances of the case, there shall be no order as to costs.

In view of the disposal of First Appeal Nos. 2587 of 2004 and 2588 of 2004, no order in Civil Application Nos. 14161 of 2007 and 14162 of 2007.

[J.R.Vora, J.]

[M.R.Shah, J.]

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